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Supreme Court, U.S.
FILED
MAY 31 2017
OFFICE OF THE CLERK

No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,

v.

R. SCOTT APPLING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

In the published decision below, the Eleventh Circuit expressly acknowledged a circuit split on an important, frequently recurring question of bankruptcy law—namely, "Can a [false] statement about a single asset be a 'statement respecting the debtor's ... financial condition,'" under 11 U.S.C. § 523(a)(2). Pet. App. 1a-2a. The court of appeals then deepened that split by directly answering that question in the affirmative, such that a debt obtained on the basis of such a fraudulent statement is dischargeable in bankruptcy unless it meets the requirements of Section 523(a)(2)(B). *See id.* at 8a-9a. And the Eleventh Circuit reversed the district court on that basis alone, holding that Appling's debt to Lamar was dischargeable, even though it was obtained by fraud, because Appling's false statements were oral, not written. *Id.* at 14a.

In response, Appling does not deny the existence of that square circuit split. *See* Pet. 10-15. He does not dispute that the question recurs frequently in bankruptcy courts across the country. *See id.* at 16-18. He does not contest the importance of the question or the need for uniformity—on this specific question or in bankruptcy law generally. *See id.* at 15-16. He does not deny that the question is squarely presented in this case, nor offer any reason why, if the Court grants review, it could not definitely resolve it. *See id.* at 18.

Instead, Appling devotes a full 70% of his "Reasons for Denying the Petition" to arguing that "[t]he decision below is correct." Opp. 12-27. The merits of the question presented, however, are for plenary review—*after* this grants certiorari. And what remains is a strained attempt to argue that review of

an acknowledged, three-to-two circuit conflict is "premature" (*id.* at 9-12) and that, notwithstanding all of the above, this case is a "poor vehicle" (*id.* at 27-30) to decide the issue. Neither argument is remotely persuasive.

All the core criteria for certiorari are met, and Appling has effectively conceded as much. The petition for a writ of certiorari should be granted.

A. There Is No Reason To Allow The Circuit Conflict To Persist Any Longer

Five Circuits have weighed in on the question presented, dividing three-to-two with published decisions on both sides of the issue. *See* Pet. 10-14. Appling nevertheless contends (at 9-12) that review of the question presented is "premature," because no court of appeals has considered and rejected his argument about the significance of the term "respecting" in Section 523(a)(2). Importantly, he does not deny that both the result and holding of the decision below is irreconciliable with the results and holdings of, at least, two other court of appeals decisions (and countless bankruptcy court decisions).[1] He contends only that the Court should wait for the Fifth Circuit (or some other Circuit) to expressly reject the Eleventh Circuit's *reasoning*. It should not.

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[1] Appling argues (at 10-11) that the Eighth Circuit's decision in *In re Lauer*, 371 F.3d 406 (8th Cir. 2004), is "inapposite" because it concerned a material *omission*, not a false *statement*. But the distinction between a false statement "respecting the debtor's financial condition" and a material omission "respecting the debtor's financial condition" itself appears only in the decision below. Neither the Eighth Circuit nor any other Circuit has relied on that distinction.

First, it is simply not true that "no court has wrestled with the plain meaning of 'respecting' and reached the result that petitioner urges." Opp. 11. Every one of the courts of appeals to adopt the majority position has considered and interpreted the same, concise statutory phrase—a "statement respecting the debtor's . . . financial condition." *See In re Bandi*, 683 F.3d 671, 676 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 845 (2013); *In re Joelson*, 427 F.3d 700, 705 (10th Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006); *In re Lauer*, 371 F.3d at 413. It would be surprising—to say the least—if those courts all somehow overlooked the preposition smack-dab in the middle of that phrase. And, in fact, they did not. *See, e.g., In re Bandi*, 683 F.3d at 677 ("The Tenth Circuit held that none of the debtor's statements pertained to her 'overall financial health' and that they were not statements 'respecting' her 'financial condition' within the meaning of § 523(a)(2)(A). . . . We agree."); *In re Joelson*, 427 F.3d at 706 ("[O]ur legal interpretation of the scope of the phrase 'respecting the debtor's . . . financial condition' will determine the outcome of this case.").

Nor is Appling the first debtor to attempt to evade his fraudulent debt on the basis of the word "respecting" (though, admittedly, no one else seems to have relied on that word so heavily and divorced from context). *See, e.g., In re Joelson* Appellants' Br. 7-8 (10th Cir. Aug. 31, 2004) (arguing that, although his false statement was "[c]oncededly . . . not a formal financial statement in the ordinary usage of that phrase," Congress "referred to a much broader class of statements—those 'respecting the debtor's . . . financial condition'"). What Appling calls ignoring the word is just the courts construing it in the context of the rest of

the provision and of the statute as a whole—and their declining to imbue the word with the same talismanic significance as Appling and the decision below. In any event, the conflict is not over the meaning of "respecting"; it is over, as Appling himself has put it, "the meaning of the entire phrase that Congress enacted—'statement respecting the debtor's ... financial condition.'" Opp. 16.

Second, there is no reason for this Court to wait—in all likelihood for a year or longer—to see what happens in *In re Haler*, No. 17-40229 (5th Cir.), a case in which the briefing is not even complete. Opp. 12. There is no guarantee that the Fifth Circuit's resolution of that appeal will shed any additional light on the question presented or that the case will reach this Court even if it did. Indeed, the debtor's *principal* argument before the Fifth Circuit in *In re Haler* is that the false statements at issue in that case *did* "purport to present a picture of the debtor's overall financial health," such that they would be subject to the requirements of Section 523(a)(2)(B) under *either* side of the split. *See Haler* Appellant's Br. 13-18 (May 1, 2017) (quoting *In re Bandi*, 683 F.3d at 677).

Moreover, even if the Fifth Circuit reaches the debtor's alternative argument concerning the meaning of Section 523(a)(2), it is unlikely that the panel (which will be bound by the Fifth Circuit's prior decision in *In re Bandi*) will address the Eleventh Circuit's reasoning at all. More likely, it will simply note that existing precedent by which it is bound resolves the issue. And there is no reason to think that the Fifth Circuit as a whole would see fit to take the case *en banc* just to consider whether it should switch sides of a circuit split that will persist either way. That is particularly true

given that Judge Owen's decision in *In re Bandi* carefully—and persuasively—considered the issue.

At the same time, denying review here, in the case actually before this Court, would impose a considerable cost. Ordinarily, the existence of an acknowledged circuit conflict on an important and recurring issue would be a sufficient reason to grant certiorari. But the constitutional interest in establishing a "uniform" law of bankruptcy makes granting review here and now all the more imperative. *See* Pet. 16.[2]

B. This Case Is The Ideal Vehicle To Resolve The Circuit Conflict

Reaching even further, Appling also suggests (at 27) that this case is "a poor vehicle for review because resolution of the question presented is unlikely to have any bearing on its ultimate outcome." Even if the Eleventh Circuit's decision is reversed on the question presented, he says, he is likely to prevail on remand because Lamar supposedly cannot prove that it lost "valuable collection remedies" when it relied on Appling's false statements. Opp. 28 (quoting *Ojeda v. Goldberg*, 599 F.3d 712, 719 (7th Cir. 2010)). This argument is just grasping for straws.

To begin with, this is not really a "vehicle" argument at all. Appling is *not* arguing that there is any possible impediment to the Court reaching and resolving the question in this case, and there is none.

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[2] Nor is there any reason to assume that another case presenting this issue will come to this Court any time soon. Although the question presented arises frequently in bankruptcy courts, the debts involved in these cases are often relatively small, making it less likely that the parties would invest in the expense of litigating the issue all the way to this Court.

His damages argument does not need to be addressed before resolving the question presented—as evidenced by the fact that the Eleventh Circuit did not address it. And because it did not, there is no reason for the Court to do so in the first instance. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view . . . ."). Appling's "vehicle" argument fails for this reason alone.

The fact that a party might attempt to advance a *different* argument on a *different* question on *remand* from this Court is no basis for denying certiorari on a question that, as here, is squarely presented. Indeed, the Court granted review (and reversed) just last Term in a case presenting an unrelated circuit split on the meaning of Section 523(a)(2) of the Bankruptcy Code, even though the respondent there made the same argument in opposing review. *See* Opp. 24, *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 (2016) (No. 15-145) (arguing that "this Court's review also [wa]s not warranted because even if this Court were to disagree [as] to the correct interpretation of section 523(a)(2)(A), that still would not change the ultimate outcome of this case" based on alternative arguments not passed upon by the court of appeals).

Moreover, it is not remotely "obvious[]" that Appling would prevail on his alternative argument on remand. Opp. 29. To the contrary, the two courts below that reached this argument roundly rejected it—and granted judgment for Lamar. *See* Pet. App. 41a-44a (district court), 62a-66a (bankruptcy court).

Appling faults (at 29) the bankruptcy court for relying on cases interpreting Section 523(a)(2)(B), not Section 523(a)(2)(A). But the Sixth Circuit's reasoning in *In re Campbell*, 159 F.3d 963 (6th Cir. 1998), applies

equally to Section 523(a)(2)(A). *See id.* at 967 (refusing to require creditors to prove the loss of a valuable collection remedy because it "would create a perverse incentive for insolvent debtors to lie to creditors to get them to forbear collection of past due indebtedness .... A borrower's incentive to act with integrity should not end once he becomes insolvent.").

In any event, the bankruptcy court found that, by the time of the November 2005 meeting, Appling had recently received a tax refund of $59,851—approximately what Appling then owed Lamar. *See* Pet. App. 48a-49a. Yet Lamar did not attempt to collect that money based on Appling's false representations at that meeting, and Appling subsequently used it to pay other business expenses, instead of paying Lamar. *See id.* at 55a-60a. To the extent Lamar has to prove on remand that it lost a valuable collection remedy based on Appling's false statements, the record fully supports it. *See Ojeda*, 599 F.3d at 720 ("Had [the creditor] chosen to collect on the loan, she would have been entitled to the full amount. Because she instead chose to forbear on the entire loan, we find that same amount non-dischargeable.").

None of this, however, takes anything away from the fact that this case is an ideal vehicle, in the sense that matters in deciding whether to grant certiorari. To date, the entire case has depended on the last court's view of the question presented. The district court and bankruptcy court adopted the majority position on the meaning of Section 523(a)(2) and resolved the case in Lamar's favor; the Eleventh Circuit adopted the minority view on the meaning of that provision and reversed. In short, the question presented has been outcome determinative.

C. Appling's Merits Arguments Do Not Undermine The Case For Certiorari

While Appling's experienced counsel makes a stab at arguing the case is not certworthy—at least invoking buzzwords like "premature" and "vehicle"—the bulk of the response just argues (at 12-27) the merits of the question presented. The merits are, of course, for the next stage of this case, if the Court grants plenary review—and not a reason to avoid such review. That is particularly true where, as here, the decision below adopted the *minority* position among the courts of appeals. Should the Court grant the petition for certiorari, we will respond in kind to Appling's merits arguments in our actual merits briefs. For now, it suffices to make a few points.

First, it is clear, based even on the cert-stage briefs, that the parties, both represented by experienced counsel, have starkly different positions on the meaning of the statutory provision at issue. That only bolsters the case for certiorari by ensuring that, if this Court grants review, the issue will be fully ventilated on both sides.

Second, as far as our position is concerned, Lamar does not, as Appling suggests, seek "an atextual interpretation" of Section 523(a)(2) or argue that the term "respecting" should be "disregarded." Opp. 15-16. We wholeheartedly urge the Court to read the statute. Rather, our point is that the word "respecting" must be read in context of the provision as a whole. In keeping with this Court's guidance on similar prepositional phrases, it should not be interpreted "to the furthest stretch of its indeterminacy," *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995), so as to

render the term "financial condition"—or, indeed, Section 523(a)(2)(A) as a whole—largely inoperative. That, in itself, is a compelling textual reason to reject Appling's interpretation. *See* Pet. 18-20.

Third, try as he might, Appling cannot paper over the unappealing consequences of his interpretation. *See* Pet. 21-22. That Appling's vision is, in fact, to subject nearly all fraudulent debts to the heightened standards of nondischargeability in Section 523(a)(2)(B) is made clear by his legislative purpose arguments. *See* Opp. 18-24. All of his purported legislative purposes—encouraging creditors to rely on written statements, creating a record for more efficient dispute resolution, and, most transparently, "ensur[ing] that a greater range of representations are protected by Section 523(a)(2)(B)," Opp. 22-23—would be best served by eliminating Section 523(a)(2)(A) altogether.

But, as we explained in the petition (at 21-22), Section 523(a)(2)(A) gives effect to one of oldest and most fundamental purposes of bankruptcy law—to extend the law's protection only to the "honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted). As both the district court and bankruptcy court found, whatever else is true, Appling was *not* an honest debtor. *See* Pet. App. 31a-38a, 52a-60a.[3] It is simply undeniable that exempting large swaths of debts obtained by false oral (instead of

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[3] Appling recounts his own version of events (at 4-6), but the bankruptcy court rejected that account. *See* Pet. App. 52a-60a.

written) statements, like Appling's, severely undermines this central object of the Code.[4]

Finally, the statutory history plainly supports Lamar's reading of the text. *See* Pet. 22-23; *In re Joelson*, 427 F.3d at 707-10. And, notwithstanding Appling's selective quotations from a handful of lower court decisions, Appling's expansive understanding of the congressional intent behind the financial-condition exception is difficult to square with this Court's view in *Field v. Mans*, 516 U.S. 59, 76-77 (1995), that in fact Congress sought to do in the 1960 amendments was to "moderate the burden on individuals who submitted false financial statements" based on specific tactics of certain dishonest consumer financial services companies, not create a massive loophole through which dishonest debtors could discharge their debts to honest creditors obtained by oral fraud.

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[4] Judge Rosenbaum acknowledged that the Eleventh Circuit's interpretation of a statement "respecting the debtor's . . . financial condition" will result in more discharges of debts obtained by *oral* false statements, as the scope of Section 523(a)(2)(A) narrows. Pet. App. 14a, 18a. But, she argued, it will concommitantly result in fewer discharges of debts obtained by *written* false statements, as the scope of Section 523(a)(2)(B) expands. *Id.* at 18a. That view is mistaken. Section 523(a)(2)(B) simply bars the discharge of a subset of debts that would otherwise be barred by Section 523(a)(2)(A). If you narrow the scope of Section 523(a)(2)(B), all of the debts that would have been exempted from discharge by that section will now be exempted by Section 523(a)(2)(A). Conversely, however, if you narrow the scope of Section 523(a)(2)(A), only those debts that meet the heightened requirements of Section 523(a)(2)(B) (including that the false statements were written) will be exempt. The rest of the debts obtained by fraud—like Appling's here—are simply lost.

* * * * *

The fact that Appling's counsel has already urged this Court to *grant* review of the question presented may explain why Appling's response is focused on the merits. *See Bandi v. Becnel*, 133 S. Ct. 845 (2013). In *Bandi*, the petitioner argued that the circuit conflict on the question presented "has spawned widespread disagreement in bankruptcy courts across the Nation" and that the issue "is one of undisputed practical importance" that "recurs frequently and, as here, typically is dispositive of the dischargeability of affected debts." *Bandi* Pet. 9 (U.S. Oct. 8, 2012). None of that has changed. What has changed, though, is that the Eleventh Circuit decision in this case eliminates any doubt over whether the conflict will resolve itself and underscores the need for this Court's intervention.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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